
2017 Report on the Effects of Changes to Tort Laws



South Carolina Department of Insurance
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

December 18, 2017



South Carolina Department of Insurance

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HENRY McMASTER
Governor

RAYMOND G. FARMER
Director of Insurance

December 18, 2017

The Honorable Henry McMaster, Governor
State of South Carolina
State House
1100 Gervais Street
Columbia, South Carolina 29201

The Honorable Hugh K. Leatherman, Sr.
President *Pro Tempore*
South Carolina Senate
111 Gressette Building
Columbia, South Carolina 29201

The Honorable James H. Lucas
Speaker
South Carolina House of Representatives
506 Blatt Building
Columbia, South Carolina 29201

RE: 2017 Report on the Effects of Changes to Tort Laws

Dear Governor McMaster, President *Pro Tempore* Leatherman and Speaker Lucas:

Section 15 of South Carolina 2005 Act No. 32, the South Carolina Noneconomic Damage Awards Act of 2005, reads as follows:

As a majority of the health care community is insured through the South Carolina Medical Malpractice Joint Underwriting Association and the Patients' Compensation Fund and as it is essential for the General Assembly to understand the effects of changes to tort laws, the South Carolina Department of Insurance is given authority to request data regarding changes in claims practices from the South Carolina Medical Malpractice Joint Underwriting Association (JUA) and the Patients' Compensation Fund (PCF). Such data may include paid claims, paid loss adjustment expense, case reserves, bulk reserves, and claim counts by quarter for the previous five years. The department may make such a request of the South

Carolina Medical Malpractice Joint Underwriting Association and the Patients' Compensation Fund and such information must be provided within thirty days.

The Department of Insurance shall report annually to the Speaker of the House of Representatives, the President Pro Tempore of the Senate, and the Governor as to whether this and other related enactments have resulted in reductions in premiums and as to any other trends of significance which might impact premium cost.

Pursuant to the above, the Department submitted requests to the South Carolina Medical Malpractice Joint Underwriting Association (JUA) and the South Carolina Medical Malpractice Patients' Compensation Fund (PCF) requesting any information relevant to the effects of tort reform. The responses from both entities are enclosed for your review.

Report Limitations

As noted in the responses from both the JUA and the PCF, it is difficult to assess the effects of tort reform for a variety of reasons which are highlighted below:

1. Claims Tail

The tort reform enacted in 2005 applies prospectively only, meaning that any claims that occurred prior to the effective date of July 1, 2005 are not affected by the reform. On average, claims with occurrence dates in a given year take over three years to be reported and over five years to settle. It is frequently the case that the more complicated and costly claims are also the longest to settle, remaining open for much longer than the average claim.

Claims under the occurrence coverage will be subjected to greater influence of tort reforms over claims-made coverage. One of South Carolina's top medical malpractice insurers surveyed in 2016 suggested that it will take time and substantial volume of closed claim data to begin to see the overall impact of tort reform on loss costs.

2. Various Factors Impacting the Marketplace

Even when more years of post-reform experience are available, measuring a given reform's impact is complicated by the difficulty in separating the effect of tort reform from variables such as inflation and other changes in the legal and social climate. For example, the consulting actuary for the PCF previously noted an industry wide decrease in medical malpractice loss trend, including in states that have not been subject to tort reform.

While they did expect this trend to impact the PCF, it would not be the result of tort reform. Further, the PCF has experienced recent and significant drops in exposure related to the elimination of unlimited coverage limits and decreases in membership. Finally, there may be a lag in implementation of reform related to uncertainty about whether the reform will ultimately be found to violate a state's laws and the length of time to resolve this uncertainty.

Tort Reform's Impact on Rates

It is worth noting there is typically a time lag between the enactment of tort reform and the data becoming available to assess its degree of effectiveness on claims and insurance rates. The current PCF rate analyses use experience that is subsequent to the tort reform. For this reason, PCF reports that the effects of tort reform are fully reflected in the PCF analysis.

1. South Carolina Medical Malpractice Joint Underwriting Association

The Joint Underwriting Association (JUA) writes coverage limits up to \$200,000 for each medical incident and \$600,000 annual aggregate (\$200K/\$600K). The JUA has not taken into consideration the impact of tort reform in their rates as their limit of liability is only \$200,000 and falls below the level of the cap on non-economic damages. The JUA had a slight rate increase in 2017; this was the first increase since 2011 and was unrelated to tort reform given their limits of coverage previously discussed.

2. South Carolina Medical Malpractice Patients' Compensation Fund

The Patients' Compensation Fund (PCF) was created to provide the option of an additional layer of coverage above the JUA's limits. The PCF currently offers limits ranging from \$1 million for each medical incident and \$3 million annual aggregate (\$1M/\$3M) to \$10 million for each medical incident and \$12 million annual aggregate (\$10M/\$12M).

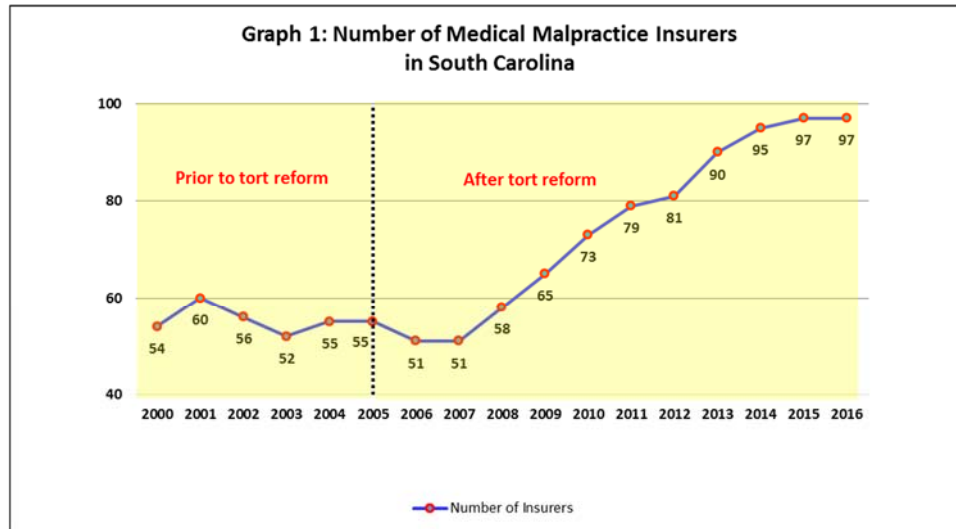
The PCF has lowered their rate levels since 2008 on three separate occasions as their overall experience has been favorable. In 2016, the PCF Board of Governors elected to approve a 2.5% increase in membership fees for the five limits of coverage that the PCF offers for 2016. In 2017, the PCF elected to change rates for some specialties which had the effect of a small overall rate reduction.

Overall Trends in the Marketplace

1. Competitive Market

South Carolina's medical malpractice market is highly competitive at present. Among U.S. states and territories, South Carolina ranked 36th in the ratio of physicians to population.¹ While the ratio of practicing physicians in South Carolina is below the national average, the number of medical malpractice carriers writing in South Carolina is still at the highest number since tort reform passed as illustrated in Graph 1.

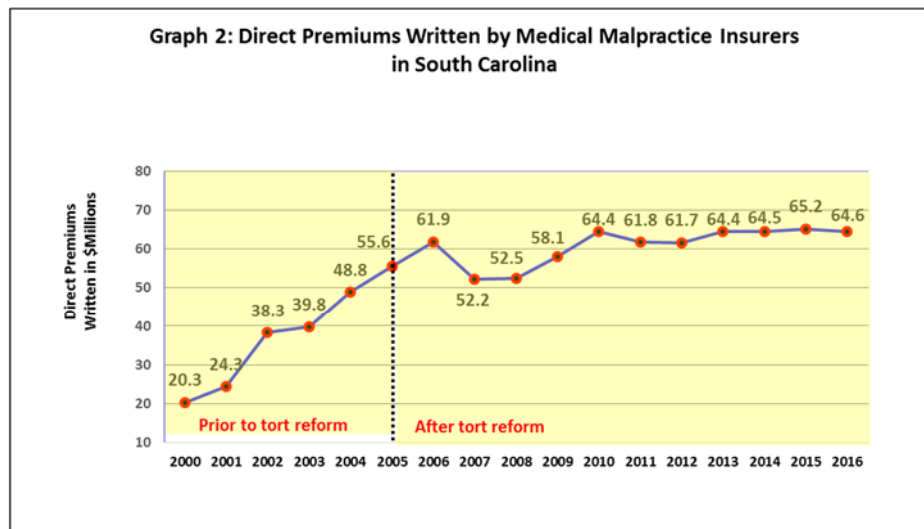
¹ Based on data from "Total Professionally Active Physicians", The Henry J. Kaiser Family Foundation, <http://kff.org/other/state-indicator/total-active-physicians/>, October 2017, accessed December 12, 2017, and "Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016," <https://www2.census.gov/programs-surveys/popest/tables/2010-2016/state/totals/nst-est2016-01.xlsx>, accessed December 12, 2017.



Source: "Countrywide Summary of Medical Malpractice Liability Insurance Calendar Years 2000-2016" NAIC, (http://www.naic.org/documents/research_stats_medical_malpractice.pdf), Accessed: November 14, 2017

The NAIC data in Graph 1 illustrates that the number of insurers fluctuated until 2007 – two years after the enactment of tort reform. Since 2008, there has been a steady increase in the number of medical malpractice insurers doing business in South Carolina. This increase has resulted in a competitive South Carolina medical malpractice market, resulting in downward pressure on premiums.

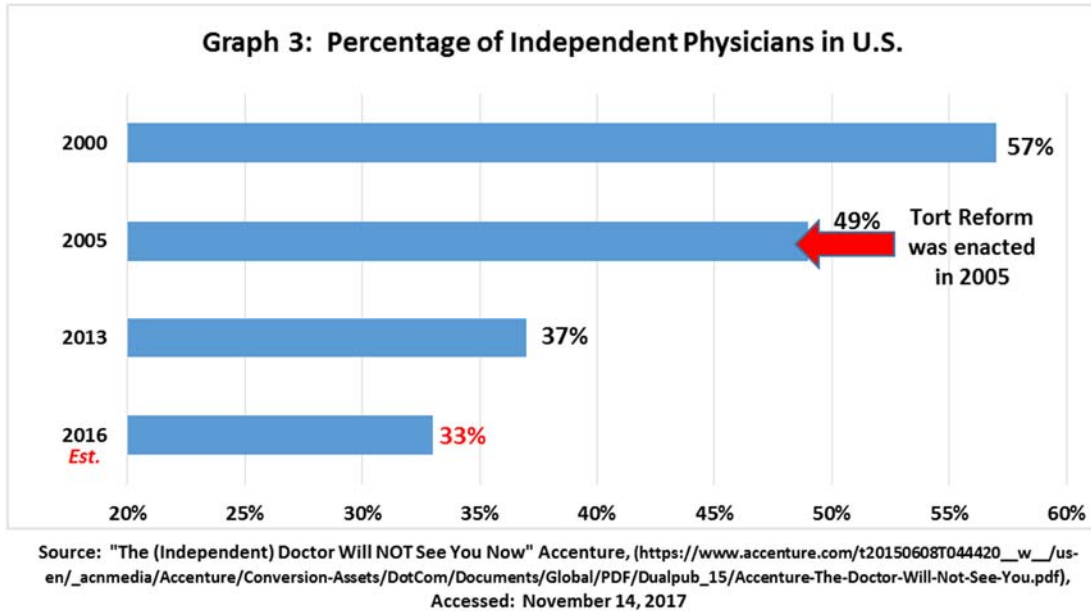
Graph 2 shows that direct premiums written steadily increased from 2000 until 2006. In 2007 there was a substantial decrease in premiums written followed by increases from 2008 to 2010. However, premiums have remained relatively smooth since 2010.



Source: "Countrywide Summary of Medical Malpractice Liability Insurance Calendar Years 2000-2016" NAIC, (http://www.naic.org/documents/research_stats_medical_malpractice.pdf), Accessed: November 14, 2017

2. *Reduced Pool of Insureds*

While the state's number of insurers and amount of direct premium writings has remained steady over the past few years, the voluntary market has experienced a substantial decrease in the pool of potential insureds.



A recent analysis completed by Accenture, as shown in Graph 3, indicated that the percentage of independent physicians was expected to decline to thirty-three (33) percent by the end of 2016.² This is most notably due to the acquisition of independent medical practices by large hospitals and the growth of integrated health systems as hospitals generally retain risk in the form of large deductibles, self-insurance or captives.³

The JUA and PCF reported that their exposures have decreased by more than 75% since tort reform was enacted as the majority of the previous exposures have become employed by hospitals and the others have become insured with other writers in the market.

3. *Rate Adequacy*

Rate adequacy is another gauge of the potential impact of tort reform over an extended period of time. In South Carolina, the market saw moderate rate increases following the enactment of tort reform, but as the adjustment period progressed the market saw some rate level reductions.

² "The (Independent) Doctor Will NOT See You Now" Accenture, (https://www.accenture.com/t20150608T044420__w_/usen/_acnmedia/Accenture/Conversion-Assets/DotCom/Documents/Global/PDF/Dualpub_15/Accenture-The-Doctor-Will-Not-See-You.pdf), Accessed: November 14, 2017

³ "The Transitioning Medical Professional Liability Market – Challenges in Valuing a Medical Professional Liability Company" Charles A. Wilhoite, CPA, and Scott R. Miller, Willamette Management Associates (http://www.willamette.com/insights_journal/13/summer_2013_12.pdf), Summer 2013, accessed December 18, 2014

Some of the largest writers of medical malpractice insurance have implemented or have indicated that they plan to implement single digit rate increases. This was not unexpected given the overall results in the market, but we do not believe that it is related to tort reform. It is possible, however, that some of the increase will be offset by the use of scheduled discounts and credits, but there is no readily available data to assess whether or not that is occurring.

The combination of the aforementioned factors has led to a highly competitive market for medical malpractice insurance in South Carolina. Both the JUA and the PCF reported a more competitive market as likely being attributable, at least in part, to the passage of tort reform legislation. The Department concurs with this assessment. Therefore, it is reasonable to conclude that these reforms have contributed to the increase in competition in the marketplace.

Again, it is important to stress that it is difficult to determine a direct causal relationship between changes in the marketplace and the 2005 law, but it is reasonable to conclude that these reforms have at least partially contributed to the increase in competition in the marketplace.

Please do not hesitate to contact me if you have any questions or if my staff or I may provide you with any additional information. My staff and I are available to discuss any of the issues raised in this report with you at your convenience and to provide technical assistance to you and members of your staff as necessary.

Sincerely,



Raymond G. Farmer
Director of Insurance

Enclosures

Cc: The Honorable Ronnie Cromer, Chairman
Senate Banking and Insurance Committee

The Honorable William E. Sandifer III, Chairman
House Labor, Commerce and Industry Committee

SOUTH CAROLINA

JUA

*the medical
liability experts*

December 7, 2017

Nancy Johnson
South Carolina Department of Insurance
1201 Main Street
Suite 10000
Columbia, SC 29201

RE: Impact of Tort Reform on Medical Malpractice Premiums for the SC JUA

Dear Nancy:

This letter is written in response to your request for information regarding the impact to the South Carolina Medical Malpractice Insurance Joint Underwriting Association (JUA) related to the passing of the Non-Economic Damages Awards Act in 2005.

The actuarial analysis that is completed annually for the JUA does not factor in a measurable impact on the rates of the JUA from tort reform due to our limit of coverage being significantly less than the non-economic caps provided in the legislation.

While the rates of the JUA are not directly impacted, due to our low policy limits, we continue to see more writers entering the medical malpractice market in South Carolina since the reforms were enacted in 2005. The JUA did receive authority from Department of Insurance to implement a small rate increase in 2017 as we continuously review our rate adequacy. While some carriers in the private market have also filed for small rate increases in 2017, the liberal usage of discounts and credits has acted to drive down premiums and create a very competitive market. It is our position that the reforms passed in 2005 have played a role in the increase of other writers entering the market in South Carolina which has led to a much more competitive market, thus driving down premiums.

Please let us know if we can be of further assistance.

Sincerely,



Timothy J Ward

Program Manager SC JUA
Senior Vice President
Marsh & McLennan Companies

Bruce Mackay, CPCU, ARe
Chairman of the Board



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South Carolina Medical Malpractice Patients' Compensation Fund

December 6, 2017

Nancy Johnson
South Carolina Department of Insurance
1201 Main Street, Suite 1000
Columbia, SC 29201

Re: South Carolina Medical Malpractice Patients' Compensation Fund
Effect of 2005 Tort Reform on Membership fees for 2017

Dear Nancy:

We are responding to your request for information regarding membership fees of the SC Medical Malpractice Patients' Compensation Fund ("PCF"), and the effect of the Non-Economic Damages Awards Act on those rates for our members (2005 Tort Reform).

This year the PCF Board of Governors requested our actuary to complete a Class Study for all specialties that are eligible for membership with the PCF. As a result there were changes to the PCF membership fees based on the classifications (maximum of 25% increase to a maximum decrease of 25%). As a result of the class study and consideration of adequate fees by PCF limits, the PCF Board of Governors approved an overall increase in membership fees of .8%. The issue of Tort Reform did not impact the Board's decision on this rate change. Our position regarding the effect of Tort Reform has not changed from our previous position last year.

We continue to believe that with the increase of malpractice writers in the state of South Carolina and the changes that it has brought, it would be difficult to isolate tort reform as a factor in the decision of the Board to make this rate change in the PCF membership fees for 2017.

Please let me know if you need anything further information.

Very truly yours,

Terry A. Coston, SCLA, CPM
Executive Director

111 Executive Center Drive, Suite 103
Columbia, SC 29210